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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

OLSON & CO. STEEL,

Plaintiffs and Appellants,

v.

NESTOR + GAFFNEY ARCHITECTURE, LLP,

Defendants and Respondents.

F063292

(Super. Ct. No. 644315)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl William Johnson III, Judge.

Law Office of Myron F. Smith and Myron F. Smith, for Plaintiffs and Appellants.

Murtaugh Meyer Nelson & Treglia and Matthew W. Johnson, for Defendants and Respondents.

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INTRODUCTION

The County of Stanislaus (County) hired defendant Nestor + Gaffney Architecture, LLP (N+G) to provide architectural services for the design and construction of a performing arts center in Modesto. Olson & Co. Steel (Olson), the structural steel

subcontractor on the project, filed this lawsuit, alleging N+G's plans and specifications were defective and caused delays that economically damaged the subcontractor.

The trial court eliminated subcontractor Olson's negligence cause of action against the architect by granting a motion for judgment on the pleadings. The court considered the lack of privity between the subcontractor and the architect, applied the economic loss rule,[1] and concluded the architect did not owe a duty of care to the subcontractor. We conclude the nine factors used to determine whether, in the absence of privity, a defendant owes a plaintiff a duty of care to prevent economic losses, cannot be applied to the allegations in Olson's pleading.[2] Consequently, we direct the trial court to grant Olson leave to amend to include factual allegations addressing the *Biakanja-Bily* factors.

We further conclude that the two-year statute of limitations set forth in Code of Civil Procedure section 339, subdivision (1)[3] applies to Olson's negligence claims and direct the trial court to grant leave to amend to provide Olson an opportunity to allege facts addressing whether such claims accrued on or after August 11, 2007.

The trial court also granted summary judgment on claims assigned to subcontractor Olson by County, on the grounds that the architect did not breach any duty of care owed to County and County did not incur any damages because of the plans and specifications prepared by the architect. We conclude that the subcontractor Olson failed

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1 Generally, tort remedies are limited by the economic loss rule, which precludes imposing a duty on a third-party tortfeasor, who lacks privity with the plaintiff, when the only damages suffered are economic, not personal injury or property damage. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 636)

2 The California Supreme Court set forth the first six of the nine factors in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) and the last three in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*).

3 All further statutory references are to the Code of Civil Procedure unless noted otherwise.

to present evidence raising a triable issue of material fact regarding damages and, thus, uphold the summary judgment as to the assigned claims.

We therefore reverse the judgment.

FACTS

Contractual Phase

On November 15, 2000, County and N+G entered an agreement for professional services under which N+G was to provide County with conceptual planning architectural designs and general coordination with County staff and consultants to develop options for the construction of a new performing arts center. N+G's compensation for these services was not to exceed $25,000.

In accordance with the agreement for professional services, County issued a work order that outlined the scope of the work N+G was to perform. N+G performed these services and County accepted the work.

On March 28, 2001, County and N+G entered into a written contract entitled "Amendment One to Professional Services Agreement" (Agreement). The Agreement outlined various architectural, engineering and related professional design services for the Stanislaus County Gallo Performing Arts Center (Gallo Center or the "Project"). The Gallo Center was to be a newly constructed complex located in Modesto, which included a 1,200 seat multi-use theatre with support facilities, a 400 seat multi-use theatre with support facilities, a lobby, restrooms, box office and gallery.

The scope of N+G's work under the Agreement included (1) program verification and design architect selection; (2) a schematic design phase; (3) a design development phase; (4) a construction documents phase, which included the preparation of the plans and specifications for the construction of the Gallo Center; (5) a bid phase; and (6) a construction phase, which included attending project meetings, reviewing and responding to contractor's requests for information and submittals, performing site observations, and reviewing contractor payment applications and requests for change orders. Under the

Agreement, N+G's compensation was not to exceed $2,182,510 to $2,255,550, unless otherwise approved by County.

N+G, with its consultants and design team, prepared the construction plans and specifications for the Gallo Center, including the plans and specifications for a bid package.[4]

The bid and construction documents prepared by N+G for the Gallo Center (1) were plan checked and approved by an independent third party plan check consultant retained by County and the City of Modesto Fire Department for the purpose of code compliance and permitting; (2) were reviewed for constructability by County's capital project team, which included a review for completeness and accuracy; (3) were subject to a post bid peer review; and (4) were approved by County's board of supervisors prior to release for bid and construction.

County placed the construction documents for the bid package for the Gallo Center out to bid. Clark & Sullivan Builders, Inc., a general contractor (C&S), was awarded the contract to construct that phase of the Project as the lowest responsible bidder. County's contract with C&S was in the sum of $21,107,000.

Olson was C&S's structural steel subcontractor on the Project. C&S issued a subcontract agreement to Olson in the sum of $2,797,000.

Construction Phase

Construction commenced on the Project in the summer of 2004. Over three years later, in September 2007, County issued a notice of completion for the Project.

Starting in 2004 and continuing throughout the construction, C&S and Olson issued numerous requests for change orders which sought additional compensation and time extensions, in some cases alleging the cause to be error and omissions in the plans prepared by N+G and its consultants. County rejected many of these change order

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4 The parties referred to the final bid package as Bid Package 3.

requests. C&S then issued claims to County seeking reconsideration of the denials of its change order requests. County then made a final determination to accept or reject each claim.

C&S Action Against County

In January 2007, C&S filed an action against County in superior court. This lawsuit was consolidated with stop notice enforcement actions by Collins Electrical Company, Inc. and W.F. Hayward Co., Inc., subcontractors hired by C&S (the Consolidated Action). In the Consolidated Action, C&S sought additional compensation from County for damages for delays and additional change order costs not approved by County. In addition, C&S's subcontractors sought enforcement of their stop notice actions against County for contract amounts not paid to the subcontractors by C&S. C&S alleged that the plans and specifications for the Gallo Center were incomplete, in conflict and inadequate.

Specifically, C&S's complaint alleged additional time was expended and extra work performed because of (1) conflicting plans and specifications regarding tolerances for construction of concrete masonry unit walls and the fabrication and erection of structural steel between those walls; (2) conflicting plans and specifications regarding the layout and requirements for metal decking along the top radius seating steps in Theatre A; (3) a lack of structural steel design drawings sufficient to construct the project; (4) conflicting plans and specifications regarding the connection of structural steel to steel embeds in the concrete masonry unit walls; and (5) changes to the structural and other design drawings made by County during construction of the project.

In addition, C&S's complaint alleged "that various subcontractors too have incurred additional costs related to the inadequacy of the plans and specifications"; that such subcontractors claimed the right to additional compensation for extra costs and delays; and that such subcontractors included Olson.

C&S and the subcontractors' claims against County involved only economic damages, not personal injuries or property damage. County did not tender its defense to N+G and did not demand N+G indemnify it.

In responding to discovery propounded in the Consolidated Action, County (1) denied that the plans and specifications were incomplete, in conflict or inadequate; (2) denied that any extra costs were incurred in association with any alleged deficiencies in the plans and specifications; (3) denied that the plans and specifications were not sufficient to construct the project; (4) stated the plans and specification complied with all legal requirements and were adequate and proper for construction; (5) stated a competent contractor following normal and customary industry procedures and contractual procedures could have built the project within the contract time and for the contract price; and (6) asserted C&S was solely responsible for the project delays and the damages allegedly incurred.[5]

Settlement Between County and C&S

After several mediation sessions, in March 2009 County and C&S entered into a settlement agreement to resolve the Consolidated Action. Among other things, the settlement agreement provided that County would issue a final closeout change order to C&S in the amount of $500,000. The final change order was issued on the condition that C&S pay each of its project subcontractors their contract balance, including retention, for their work on the project.

The settlement agreement also included County's agreement to assign certain claims to Olson. In particular, the assignment document stated that "County hereby assigns to Olson all of its right, title and interest, without recourse, in and to those claims,

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[5] In N+G's motion for summary judgment, it used County's discovery responses to argue that the claims assigned to Olson by County had no merit. Olson disputed N+G's reliance on County's discovery responses on the grounds that the responses had been qualified and objected to as premature and needing an expert opinion.

if any, that it may possess against [N+G] arising from the contractual agreement(s) between the County and [N+G] concerning the design and construction drawings for the Gallo Arts Center, Modesto, California."

As a result of the settlement, the total compensation that C&S received under its contract with County totaled $22,803,940, which consisted of the original contract amount of $21,107,000 plus $1,696,940 in change orders (which change orders included the $500,000 change order paid pursuant to the settlement agreement). N+G contends that the total paid to C&S for constructing the Gallo Center was within the budget for that portion of the project.

TRIAL COURT PROCEEDINGS

In August 2009, Olson began this litigation against N+G. The operative pleading in this case is Olson's second amended complaint (SAC), containing five causes of action: three as the assignee of County and two in its own right. As County's assignee, Olson alleged claims for (1) breach of written contract, (2) express indemnity, and (3) professional negligence. In its own right, Olson alleged a negligence claim (fourth cause of action) and a contract claim based on the theory that it was a third party beneficiary to the contract between County and N+G (fifth cause of action).

Judgment on the Pleadings

In November 2010, N+G filed a motion for judgment on the pleadings as to the fourth and fifth causes of action—that is, the claims Olson asserted in its own right for negligence and as a third party beneficiary of the Agreement.

On December 22, 2010, the trial court filed an order granting N+G's motion for judgment on the pleadings and denying leave to amend. The order stated that an architect owes no duty of care to subcontractors under the facts presented on the negligence claim and Olson could not allege the existence of a third party beneficiary contract.

Summary Judgment

In February 2011, N+G filed a motion for summary judgment or, in the alternative, summary adjudication regarding the first, second and third causes of action that Olson was asserting as the assignee of County.

Olson opposed the summary judgment motion and filed declarations of Myron F. Smith, William Pepoon and Larry Cushman to support its opposition. Olson subsequently submitted amended declarations. Smith's amended declaration addressed the $500,000 in new money County paid to C&S to settle the Consolidated Action. Pepoon's amended declaration addressed (1) the lack of detail in N+G's plans and specifications, (2) the extra man-hours and days need to fabricate the structural steel for the project, and (3) the amount of damages ($913,007) Olson incurred as a result of the extended time for fabrication and erection of the structural steel. The amended declaration of Cushman stated he was an employee of Olson with 22 years of experience in steel detailing and set forth his opinion that N+G's plans and specifications were inadequate.

N+G filed a reply to Olson's opposition papers. In addition, N+G filed nine written objections to the amended declarations of Smith, Pepoon and Cushman that Olson had offered in support of its opposition to the motion for summary judgment.

On May 27, 2011, the trial court heard N+G's motion for summary judgment. At the beginning of the hearing, the court indicated its tentative ruling was to grant the motion, stating: "Basically, in summary, there's no showing of any damages by anyone there." After argument was presented, the court stated that the discovery responses of County said it had no damages and the opposition declarations "on this matter only speak to possible damages on behalf of Olson, nothing for the County." The court concluded that plaintiff had not carried its burden of demonstrating a triable issue of material fact and, therefore, adopted its tentative ruling of granting the motion.

On June 27, 2011, the trial court filed an order (1) granting the motion for summary judgment, (2) sustaining N+G's objections Nos. 1, 2, 3, 7 and 9 to Olson's opposing evidence and overruling all other objections, and (3) denying N+G's request for judicial notice of license board searches it had conducted for William Pepoon and Larry Cushman. The order stated there was no triable issue of material fact regarding N+G's breach of a duty of care owed to County or County's incurring any damages because of the plans and specifications prepared by N+G.

In August 2011, Olson filed a notice of appeal challenging the June 2011 order granting the motion for summary judgment on the first three causes of action and the December 2010 order granting the motion for judgment on the pleadings as to the fourth and fifth causes of action in the SAC.

DISCUSSION

I. JUDGMENT ON THE PLEADINGS

Olson's fourth and fifth causes of action asserted negligence and third party beneficiary claims. The trial court granted judgment on the pleadings as to each claim. On appeal, Olson concedes it is not a third party beneficiary of the County and N+G Agreement. Thus, Olson is claiming reversible error only as to the negligence claims against N+G. As a result, our analysis of the motion for judgment on the pleadings is limited to the negligence claims.

A. Standard of Review

When an appellate court reviews an order granting a motion for judgment on the pleadings, it conducts an independent review to determine whether a cause of action has been stated. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401.) Our Supreme Court has described that independent review as follows:

> "[W]e treat the properly pleaded allegations of [the] complaint as true, and also consider those matters subject to judicial notice. [Citations.] 'Moreover, the allegations must be liberally construed with a view to

> attaining substantial justice among the parties.' [Citation.] 'Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.' [Citation.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232.)

In other words, appellate courts apply the same rules when reviewing the grant of a motion for judgment on the pleadings as they apply when reviewing an order sustaining a general demurrer. (*Mendoza v. Continental Sales Co.*, *supra*, 140 Cal.App.4th at p. 1401.)

B. Existence of a Duty

The trial court granted the motion for judgment on the pleadings on the negligence claims based on its conclusion that N+G did not owe a duty of care to subcontractor Olson, because it had no contractual relationship with that entity. In effect, the court ruled that the economic loss rule applied. That rule limits tort liability to situations involving damages from physical or personal injuries and excludes purely economic loss. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 636, superseded by statute on another point as noted in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 483, fn. 2.)[6]

The California Supreme Court has recognized exceptions to the economic loss rule. In certain situations, public policy considerations justify imposing a duty of care that extends to economic losses. In *Biakanja, supra,* 49 Cal.2d 647, the California

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[6] See generally, Annotation, *Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor* (2008) 61 A.L.R.6th 445 (collection of cases in which contractors or subcontractors sued the architect or engineer in tort to recover economic losses); Steffey, *Negligence, Contract and Architects' Liability for Economic Loss* (1994) 82 Ky. L.J. 659 (stating the trend prior to the article was to allow a contractor to sue the owner's architect in negligence for solely economic losses); and *A. R. Moyer, Inc. v. Graham* (Fla. 1973) 285 So.2d 397 (third party general contractor who sustained economic loss proximately caused by architect's negligent performance of contractual duty has a negligence cause of action against architect notwithstanding lack of privity).

Supreme Court set forth guidance for courts making the policy determination as to whether a duty of care exists in a particular case:

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." (*Id.* at p. 650.)

The Supreme Court provided further guidance for determining whether a professional owed a duty to a third party where there was no contractual relationship in *Bily*, *supra*, 3 Cal.4th 370. In *Bily*, the court held that the auditors of a company owed no duty to third party investors who lost money relying on "'clean'" audit opinions of a company's financial statements when those statements had grossly understated the company's liabilities. (*Id*. at pp. 377-378.) The court has identified three additional factors to be weighed in making the policy determination regarding the existence of a duty: (7) the degree to which there might be a potential liability out of proportion to fault, (8) the level of sophistication of the plaintiff in the context of the transaction (including the potential for what the court called "'private ordering'" to contractually protect against the risk), and (9) the balance between, on the one hand, efficient loss spreading, and, on the other hand, and the potential for dislocation of resources. (*Id.* at p. 398.)

The majority in *Bily* mentioned architects in dicta addressing the liability of professionals to third parties, from which we infer that the additional three factors should be considered in the present case. (*Bily*, *supra*, 3 Cal.4th at p. 401.)

The application of the nine *Biakanja-Bily* factors to determine whether a duty of care is owed regarding economic damages is a legal question decided on a case-by-case

basis. (*Aas v. Superior Court*, *supra*, 24 Cal.4th at p. 644; *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1610.)

In the instant case, Olson's allegations present two separate theories of negligence and, accordingly, we will address whether N+G owed Olson a duty in each context. The first theory concerns N+G's errors and omission in preparing the plans and specifications. The second theory alleges N+G negligently administered the project in its capacity as supervising architect.

1. Duty Regarding Plans and Specifications

Because we are reviewing an order granting a motion for judgment on the pleadings, our review is limited to the factual allegations in the SAC, which we assume are true. (Cf. *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152 (*Weseloh*) [duty question resolved in a motion for summary judgment; designers of retaining wall did not owe duty of care to owner of the property or to the general contractor that built the wall].)

In connection with its claim that N+G was negligent in the preparation of the plans and specifications for the Gallo Center, Olson alleged that (1) County retained N+G to prepare the plans and specifications; (2) the plans and specifications prepared by N+G affirmatively represented to all bidders that the plans and specifications met the requirements of AISC and County's building code; (3) County utilized the plans and specifications to secure competitive bids; (4) N+G acted as the agent of County in preparing the plans and specifications; (5) Olson received from County a set of N+G's plans and specifications, relied upon them to prepare its bid to C&S for preparation of the structural steel portion of the project, and utilized the plans and specifications in the construction of the project; (6) the plans and specifications failed to conform to N+G's written representations and failed to meet the standard requirements for a competitive bid set to be utilized on a public construction project in California; (7) after commencement

of the work, Olson discovered errors and omissions in N+G's plans and specifications; and (8) the errors and omissions caused Olson damages in the form of additional costs and delays. Olson also alleged its damages were foreseeable on the part of N+G in that N+G knew or should have known that the plans and specifications would be used in the construction of a public works project.

We conclude that the allegations in the SAC fail to provide enough information for this court to apply the nine *Biakanja-Bily* factors and reach a definitive answer as to whether N+G owed Olson a duty or not.

As to the first factor, which concerns the extent to which the transaction was intended to affect Olson, it appears to have been addressed by some allegations in the SAC. For instance, the SAC and the attached portions of the Agreement show that N+G was aware that the plans and specifications would be part of the bid package and, thus, would be *used by bidders* in submitting bids on the Project. In addition, the SAC alleged that N+G knew or should have known that the plans and specifications also would be *used in the construction* of the Project. Thus, it is reasonable to infer[7] that County and N+G intended the plans and specifications to be relied upon by (1) the various contractors and subcontractors bidding on the Project and (2) the successful bidders in building the Project.

These allegations and inferences weigh in favor of the existence of a duty. In *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, the appellate court considered the *Biakanja* factors and concluded an architect owed a duty to third parties who had purchased condominiums in a residential project at Mammoth Lakes. The purchasers sued the builder-seller of the condominiums, the sales agents, and the project's architect, alleging

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[7] When considering a motion for judgment on the pleadings, the reviewing court assumes the truth of all facts that may be inferred reasonably from the facts pled. (*Mendoza v. Continental Sales Co., supra* 140 Cal.App.4th at pp. 1401-1402; § 452 [liberal construction of allegations in pleading].)

that the project was defectively, illegally and dangerously constructed. (*Cooper v. Jevne, supra,* at p. 864.) The architects filed a general demurrer to the purchasers' negligence cause of action and it was sustained by the trial court. The appellate court reversed, reasoning that the "architects must have known that the condominiums they designed and whose construction they supervised were built by [their client] for sale to the public and that purchasers of these condominiums would be the ones who would suffer economically, if not bodily, from any negligence by the architects in the performance of their professional services." (*Id.* at p. 869.) The court stated that it found nothing in the test enunciated in *Biakanja* that would lead it to refrain from imposing liability for economic loss to the purchasers upon the architects for negligence in rendering their professional services. (*Cooper v. Jevne, supra,* at p. 868.)

The next three factors in *Biakanja* are related to damages—specifically, the foreseeability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, and the closeness of the connection between the defendant's conduct and the injury suffered. The SAC alleges Olson's damages were "in the form of additional costs, and delays" and makes the general allegation that those "damages were foreseeable on the part of [N+G]."

These sparse allegations do not identify what additional costs Olson incurred. Thus, we do not know if those costs were additional labor, additional material or expenses for consultants to assist in resolving the alleged deficiencies in the plans. As to the alleged delays, it cannot be determined what economic losses occurred because of them and whether those losses were different from the additional costs alleged. For example, it cannot be determined if Olson is claiming the delays resulted in lost profits that it could have earned on other projects or is making a redundant claim that the delays added to its costs.

Information available in the papers addressing the summary judgment motion show that Olson is able to amend to provide more detail regarding the additional costs

and to identify the injuries it claims to have suffered due to the alleged delays. Further detail would allow an evaluation of (1) the extent to which those additional costs and delay injuries were foreseeable, (2) the degree of certainty that plaintiff incurred the costs and suffered the injuries from delay, and (3) the connection between the allegedly defective plans and the additional costs and delay injuries. Therefore, we direct the trial court to grant Olson leave to amend to provide more detailed allegations regarding the alleged damages. In making these allegations, Olson should provide details that assist the court in applying the *Biakanja-Bily* factors.

With regard to the moral blame factor, the SAC's allegations that the plans and specifications failed to conform to N+G's written representations and failed to meet the standard requirements for a competitive bid set utilized on a public construction project appear to indicate that N+G's conduct was relatively low on the scale of moral blame. (*Biakanja*, *supra*, 49 Cal.2d at p. 650 [moral blame of notary public practicing law without a license was high]; *Weseloh*, *supra*, 125 Cal.App.4th at p. 169 [moral blame associated with negligence on part of engineer was minimal].) The allegations do not point to particular circumstances in this case that would increase the moral blame of N+G's conduct.

Olson argues on appeal that moral blame should attach to professionals who do not attain these standards. There are, however, no allegations as to the precise standards and written representations that N+G is alleged not to have met. More particular allegations of these matters would allow a better assessment of the moral blame. Also, an allegation explaining why the alleged failures were not of the type that would have been recognized by Olson during the preparation of its bid would aid in evaluating the moral blame of the various parties involved in the transaction.

With respect to the policy of preventing harm, the SAC does not allege whether other types of harm, other than the delays and additional costs alleged, could result from the alleged defects in the plans and specifications. Thus, in analyzing this factor, it is

uncertain whether the harm to be prevented is limited to delays in the Project and additional costs in completing the Project (i.e., economic losses of contractors and subcontractors) or whether additional types of harm might be prevented if a duty is imposed in this situation. Therefore, additional allegations would aid in the evaluation of this policy factor.

Olson's appellate brief has not addressed the three additional *Bily* factors and it appears that the SAC was drafted without reference to these additional factors. For example, the SAC makes no allegations about the exposure an architect would have on a project of this type so that a comparison could be made to the architect's compensation and the proportion of its fault. Also, the SAC is devoid of allegations regarding Olson's ability to address the risks of inadequate plans and specifications in a public works project through the contracts it enters. For example, the less opportunity the bidding and contracting process provided to Olson to protect itself from the risks of inadequate plans, the more likely a duty would be imposed upon N+G. Conversely, if the bidding and contracting process allows the subcontractor the opportunity to negotiate with the contracting owner for assurances regarding the adequacy of the plans and specifications, then it is less likely a duty would be imposed upon the designing architect.

Based on the foregoing, we conclude that the allegations do not provide enough information to properly evaluate the nine *Biakanja-Bily* factors and reach a definitive conclusion as to whether N+G, in its role as designing architect, owed a duty of care to Olson, a subcontractor on the Project. In short, because the factors must be applied on a case-by-case basis, we are reluctant to reach a conclusion based on matters that are not set forth in the pleadings, but might be regarded as general knowledge about the public works contracts. Accordingly, we direct the trial court to grant Olson leave to amend to include allegations directed at the *Biakanja-Bily* factors.

2. Duty Regarding Negligent Supervision

Olson's other theory of negligence relates to N+G's administration of the project. (See generally, 11 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 29:35, pp. 29-178 to 29-185 [architect's liability for negligent supervision].)

The SAC alleged that County and N+G entered into the Agreement, under which N+G would provide professional services for the administration of the construction of the Gallo Center. Paragraph 36 of the SAC contains the pertinent allegations concerning the negligent supervision claim:

> "[N+G] was further retained to administer the course of construction and respond to and/or correct its plans and drawings. [N+G] owed a duty of care to [Olson] to administer the course of construction and respon[d] to requests for information in such a manner as to permit the orderly and proper construction of the Project. [N+G] negligently administered the course of the project and interpretation of the plans and specifications in such a manner as to cause delay and extra cost and other economic damages to [Olson]."

The foregoing allegations were supplemented by a copy of the Agreement, which was attached as an exhibit to the SAC. Section 3.7 of the Agreement addressed N+G's obligations during the construction phase: "[N+G] shall provide services during the Construction Phase through completion and acceptance of the project by the County Board of Supervisors. Should the time for construction exceed 19 months, [N+G's] services beyond that time will be compensated for under the Additional Services Clause of this contract if the delay is through no fault of [N+G]."[8]

Because we are analyzing the question of duty in the context of an order granting N+G's motion for judgment on the pleadings, the foregoing allegations and contract

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8 Only the first seven pages of Amendment No. 1 of the Agreement were attached to the SAC. Thus, for purposes of the motion for judgment on the pleadings, the provisions of the Agreement (i.e., section 7.12) that set forth the details of N+G's duties during the construction phase are not subject of our review.

provision constitute the facts to which this court must apply the nine *Biakanja-Bily* factors.

As with the negligent design claim, we conclude further information is required before the nine factors can be applied to this case and a determination made whether N+G, in its role during the construction phase of the project, owed a duty of care to Olson, a subcontractor on the project.

The information available from the SAC does not indicate (1) the details of the relationship between N+G and Olson while N+G was administering the course of the project, interpreting the plans and specification, or responding to requests for information or (2) whether N+G knew that its acts or omissions during the construction phase would directly affect Olson. This relationship and N+G's knowledge is relevant to applying the first factor concerning the extent to which the transaction was intended to affect Olson as well as the second factor concerning the foreseeability of harm to Olson. (See *Exxonmobil Oil Corp. v. Nicoletti Oil, Inc.* (E.D.Cal 2010) 713 F.Supp.2d 1105, 1114 [negligence claim dismissed *with leave to amend* to add facts concerning the "'intended to affect'" factor]; *Cooper v. Jevne, supra,* 56 Cal.App.3d at p. 869 [architects must have known buyers of condominiums would suffer economically from architects' negligence].)

Also, the allegation about "extra cost and other economic damages" is so general that it is difficult to evaluate the degree of certainty that Olson suffered injury (i.e., the third factor) or the closeness of the connection between the alleged negligence and Olson incurring the extra cost (i.e., the fourth factor). Unlike the allegation regarding errors and omissions in the plans and specifications, the SAC does not include a general allegation that the "extra cost and other economic damages" suffered by Olson was foreseeable to N+G.

We recognized that cases applying California law have held supervising architects owe a duty of care to third parties. The oldest case applying the *Biakanja* factors to a supervising architect is *United States v. Rogers & Rogers* (S.D.Cal 1958) 161 F.Supp.

132. In that case, the district court denied a supervising architect's motion for summary judgment on the prime contractor's negligence claim for economic damages. The court stated the following frequently quoted rationale:

> "Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility."[9] (*Id*. at p. 136.)

Despite the holding in that case and the number of other jurisdictions that have concluded that contractors or subcontractors can bring a negligence claim against a supervising architect for economic loss, we will remand in this case and direct the trial court to grant Olson leave to amend its pleading to include allegations that address the *Biakanja* factors as well as the *Bily* factors.

C. Statute of Limitations

The trial court did not address which statute of limitations applied to Olson's cause of action for professional negligence because it determined that N+G did not owe a duty of care to Olson and, therefore, Olson could not plead facts sufficient to establish a negligence claim.

On appeal, N+G contends that (1) the trial court's dismissal of Olson's negligence claim is justified based on the two-year statute of limitations set forth in subdivision (1) of section 339[10] and (2) this court can affirm on statute of limitations grounds because

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[9] As a recent example, part of this rationale was quoted in *Harris Builders, LLC v. URS Corp.* (E.D.La. (2012) 861 F.Supp.2d 746, a case in which the court held the general contractor's complaint stated a negligence claim against the construction manager of the project.

[10] This subdivision applies to an "action upon a contract, obligation or liability not founded upon an instrument of writing."

appellate courts review the decision, not the correctness of the underlying rationale. (See *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 975 [trial court's decision will be upheld if correct on any ground].)

1. Applicable Statute of Limitations

Olson's appellate briefing does not address the statute of limitations issue. Nonetheless, the appellate record contains an opposition to a demurrer in which Olson argued that the four-year limitation period in section 337.1 applies. Therefore, we will address which statute of limitations applies—the two-year period set forth in subdivision (1) of section 339 or the four-year period set forth in Code of section 337.1

Section 337.1 provides in part:

> "(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:
>
> "(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;
>
> "(2) Injury to property, real or personal, arising out of any such patent deficiency; or
>
> "(3) Injury to the person or for wrongful death arising out of any such patent deficiency. [¶] … [¶]
>
> "(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action. [¶] . . . [¶]
>
> "(e) As used in this section, 'patent deficiency' means a deficiency which is apparent by reasonable inspection."

This statute of limitations is unlike most such statutes because it fixes the point at which the limitations period begins to run at the completion of construction, rather than

being triggered by the accrual of the cause of action. (*Tomko Woll Group Architects, Inc. v. Superior Court* (1996) 46 Cal.App.4th 1326, 1334.) The purpose of this statute is to prevent uncertain liability from extending indefinitely into the future. (*Id*. at p. 1336.) By capping the period at four years, the Legislature intended to reduce the uncertain liability for those who design and construct real property improvements and thereby promote construction. (*Id*. at pp. 1333-1334.)

Read literally, it appears section 337.1 applies to this instant case. Olson's action is brought against a person furnishing designs and performing supervision of construction and is based on patent deficiencies in the designs and specifications and in the supervision of construction. This literal reading of the statute, however, has not been adopted by the courts. Instead, the language has been construed narrowly to limit it to the problem that the Legislature was attempting to alleviate.

For example, in *Kralow Co. v. Sully-Miller Contracting Co.* (1985) 168 Cal.App.3d 1029 (*Kralow*), a developer entered a contract with the city's redevelopment agency that provided the agency would to complete certain public improvements related to the redevelopment project. When delays in the completion of these improvements occurred, the developer sued the contractor hired by the agency as well as a subcontractor, alleging that the delay was caused by patent deficiencies in the improvements resulting from the negligence of the contractor and subcontractor. The developer contended that its lawsuit was timely under the four-year period set forth in section 337.1. (*Kralow, supra,* at p. 1032.) The court disagreed and concluded that Code of section 337.1 did not apply to all claims arising from patently deficient construction work. (*Kralow, supra,* at p. 1035.) The court reached this conclusion based on its belief that "the intent of the Legislature in enacting section 337.1 was to provide a cause of action for *patent deficiencies existing upon substantial completion of a project*." (*Ibid*., italics added.) The developer's claim did not qualify because the developer was seeking damages solely for delay, not for patent deficiencies that still existed upon completion of

the project. (*Ibid*.) In other words, the deficiencies caused delays but these deficiencies were resolved and no longer existed when the project was completed. The developer could not benefit from the four-year cap.

A situation similar to Olson's was addressed in *Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638 (*Roger E. Smith*). There, a general contractor on a county library project filed an action for professional negligence against the architect and the construction manager. The contractor alleged it incurred economic losses because of (1) errors in the architect's plans and specifications and (2) the construction manager's failure to coordinate and inspect the project in a competent and timely manner. (*Id*. at p. 641.) The trial court granted summary judgment based on the two-year statute of limitations set forth in Code of Civil Procedure section 339, subdivision (1). (*Roger E. Smith, supra,* at p. 641.) The court of appeal affirmed. (*Ibid*.)

The court in *Roger E. Smith* began its analysis of the applicable statute of limitations by noting that, as a general matter, section 339, subdivision (1) applies to claims for professional negligence. (*Roger E. Smith, supra*, 89 Cal.App.4th at p. 642.) Next, the court considered whether the more specific provisions of section 337.1, which address claims for injury arising from patent deficiencies in construction, applied. (*Roger E. Smith, supra,* at p. 643.)

The court in *Roger E. Smith* agreed with the interpretation adopted by the *Kralow* court, explaining that it "would seem illogical for the limitations period in section 337.1 to be postponed until the time of substantial completion and then to encompass claims for patent deficiencies that had been corrected in the meantime." (*Roger E. Smith, supra*, 89 Cal.App.4th at p. 646.) In other words, when the deficiency is corrected and, thus, can no longer cause new problems, the purpose underlying the four-year limitation period is not served by applying that extended period (i.e., it does not lessen the liability exposure of design professionals and make them more likely to provide services to the public).

We join the holding of the courts in *Roger E. Smith* and *Kralow*: Section 337.1 does not apply to claims of injury based on patent deficiencies when the alleged deficiencies no longer exist upon substantial completion of construction.

In this case, Olson alleges that the deficient plans and supervision caused delays and additional costs. Olson does not allege that the deficiencies in N+G's plans and specifications still existed when the Gallo Center was substantially complete. Furthermore, Olson's allegations that the defects *delayed* work and that County filed a notice of completion in September 2007, imply that the defects in plans and administration were resolved and the structural steel work completed. Therefore, under the principle established by *Kralow* and adopted in *Roger E. Smith*, we conclude that Olson's claims for negligent design and negligent administration fall within the two-year statute of limitations generally applicable to claims for professional negligence. (§ 339, subd. (1).)

2. Olson's Argument Regarding Accrual of Its Negligence Claims

Determining the timeliness of Olson's negligence claims requires us to identify when those claims accrued and whether this lawsuit was filed within two years of the accrual date. Because the lawsuit was filed on August 11, 2009, the question is whether the negligence claims accrued on or after August 11, 2007.

"A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence. [Citation.] While 'the mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence,' an action accrues, and the statute begins to run, as soon as the plaintiff suffers 'appreciable harm' from the breach. [Citation.]" (*Roger E. Smith*, *supra*, 89 Cal.App.4th at pp. 650-651.)

In the trial court, Olson argued that it "was not fully aware of whether or not damages occurred until the project was substantially completed in September of 2007, when County recorded its Notice of Completion.… [Olson's] damages were not certain until the County refused to pay for the costs related to the defective plans."

In *Roger E. Smith, supra,* 89 Cal.App.4th 638 the appellate court addressed an argument similar to that raised by Olson:

> "[The general contractor] indisputably suffered out-of-pocket costs during construction due to the approximately 200 requests for information it claims were necessitated by respondents' deficient work. Whether the County would agree to reimburse [the general contractor] for some or all of these costs in the future did not change *the fact* that [the general contractor] had suffered losses directly attributable to respondents' negligence; it merely had the potential of altering *the amount* of that damage." (*Id*. at p. 651.)

Accordingly, Olson sustained damages in the form of additional costs when it incurred those costs, not when it learned County would not reimburse those costs. Therefore, we reject Olson's argument that its damages were not certain until County refused to pay for cost related to defective plans.[11]

3. Events Relevant to Accrual of Negligence Claim

The sequence of events relevant to the application of the two-year statute of limitations begin in the summer of 2004, when C&S and its subcontractors commenced work on the Gallo Center. Next, Olson commenced its work under the bid package and "[d]elays and problems ensued in connection with the Gallo [Center's] plans and

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11 The determination of when a plaintiff suffers appreciable harm requires courts to distinguish between the *fact and knowledge* of damage and the *amount* of damage. (*Roger E. Smith, supra,* 89 Cal.App.4th at p. 651.) Uncertainty of the fact of damage negates the existence of a cause of action. (*Ibid*.) In contrast, uncertainty as to the amount of damages does not prevent the accrual of the cause of action. (*Ibid*.) Here, Olson's argument about uncertainty goes to the amount of damages, not whether the additional costs were sustained.

specifications thereby causing the Project to extend beyond its completion date and resulting in additional costs and expenses to the County …." Similarly, the SAC alleged: "After commencement of the work, [Olson] discovered errors and omissions on the part of [N+G] in the preparation of the plans and specifications which caused [Olson] damages in the form of additional costs, and delays."[12]

As to its negligent supervision theory, Olson alleged that N+G "negligently administered the course of the project and interpretation of the plans and specifications in such a manner as to cause delay and extra cost and other economic damages to [Olson]." As with the alleged additional costs and delay caused by the defective plans and specifications, the SAC does not allege when the additional costs caused by the negligent administration of the project were incurred by Olson.

On September 7, 2007, County issued the notice of completion for the Gallo Center.

In March 2009 County and C&S entered into a settlement agreement to resolve the Consolidated Action. The terms of the settlement included County assigning its rights against N+G to Olson.

On August 11, 2009, less than two year after County filed its notice of completion, Olson filed this lawsuit against N+G.

The allegations set forth in the SAC are uncertain and, thus, do not allow this court to determined when Olson first incurred additional costs or other damages with respect to each potential breach of duty. As a result, we cannot determine whether there were any alleged breaches that did not result in damages on or after August 11, 2007. For instance, the SAC does not allege that N+G negligently handled a particular request for

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12 We note here that Olson's reference to "after the commencement of the work" does not specifically identify when the last alleged error or omission was discovered or when the damages from that particular error or omission were first incurred by Olson.

information and, as a result of the delays occasioned by that negligence, Olson first incurred additional costs after the cutoff date of August 11, 2007.

Because this case is being remanded for additional allegations relevant to the duty of care question and those additional allegations will provide more information about the damages allegedly suffered by Olson, we direct the trial court that Olson clarify the uncertainty in its pleading regarding the timing of those damages. Therefore, Olson's amendment should include allegations addressing (1) what additional costs or other injuries were incurred on or after August 11, 2007, and (2) whether those additional costs or injuries were the first damages arising from a particular negligent act or omission. We are requiring this specificity in Olson's amendment because Olson's papers in the trial court relied on a four-year limitations period and it is not clear whether Olson is contending it can amend to allege the claim for a particular negligent act or omission accrued on or after August 11, 2007. To aid the efficient use of judicial resources, we conclude it reasonable to require Olson to address the question in its amended pleading.

II. MOTION FOR SUMMARY JUDGMENT

A. Standards of Review

1. Summary Judgment

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).)

Appellate courts independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing this independent review, appellate courts apply the same three-step analysis as the trial court. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607 (*Brantley*).) First, the court identifies the issues framed by the pleadings. Next, the court determines whether the moving party has

established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id*. at p. 1602; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012), ¶ 8:166, p. 8-131 [three-step analysis].)

Appellate courts determine whether a triable issue of material fact exists by considering all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (§ 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

2. Trial Court's Evidentiary Rulings

Some uncertainty is associated with the standard of review applicable to a trial court's rulings on evidentiary objections related to a motion for summary judgment. In *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, the court noted that the proper standard of review for rulings on evidentiary objections based on papers alone was not settled. (*Id*. at p. 255, fn. 4.) Recently, the California Supreme Court stated that "we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

The weight of authority, however, holds that appellate courts review the trial court's rulings on evidentiary objections in summary judgment proceedings for abuse of discretion. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012), ¶ 8:168, p. 8-132; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

We join the majority view and conclude that a trial court's rulings on evidentiary objections in a summary judgment proceeding is reviewed for an abuse of discretion. (See *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335;

Alexander v. Codemasters Group Limited (2002) 104 Cal.App.4th 129, 140, fn. 3 [Fifth App. Dist. refers to abuse of discretion standard].)

B. Specificity of Rulings on Evidentiary Objections

The trial court's written order sets forth the following rulings on N+G's evidentiary objections: "Defendant's objections Nos. 1, 2, 3, 7 and 9 to Plaintiff's opposing evidence are **SUSTAINED**. All other objections are **OVERRULED**."

Olson contends that the trial court erred as a matter of law when it failed to state the specific reasons for sustaining these objections to portions of the declarations of Smith, Pepoon and Cushman. Olson asserts: "The courts have found this not to be a harmless error when the trial court has the discretion to either ignore or accept a declaration that conflicts with other submitted evidence." Olson cited no case or secondary authority to support its assertion about what other courts have done. Furthermore, the only reference to any authority in this part of Olson's opening brief is the mention of section 437c, subdivision (g) at the end of heading IV.A. Section 437c, subdivision (g) provides in part:

> "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. *The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order*." (Italics added.)

Olson's contention implies that the statutory phrase "any other determination" was meant to include rulings sustaining evidentiary objections and the phrase "shall … state its reasons" was meant to require the trial court to identify the specific ground or grounds upon which each evidentiary objection was sustained.

Other interpretations of this statutory language are possible.[13] For example, (1) the phrase "any other determination" could refer to the decision to include or exclude evidence and (2) stating the "reasons for" the decision to include or exclude evidence could be as simple as specifying whether an objection to a particular piece of evidence was sustained or overruled. Such an interpretation is consistent with the proposed form of order that California Rules of Court, rule 3.1354(c) requires to be submitted with written evidentiary objections: "The proposed order must include places for the court to indicate whether it has sustained or overruled each objection." (Cal. Rules of Court, rule 3.1354(c).) The rule does not require the court to state the specific ground upon which it is sustaining a particular objection. Instead, the rule's two formats for the proposed order allow a court to resolve a particular objection simply by marking the line after either the word "sustained" or "overruled."

In addition, one of the objections addressed in the form of proposed order set forth in California Rules of Court, rule 3.1354(c) contains two grounds—hearsay and lack of personal knowledge. This form of proposed order permits the court to sustain the objection without designating which of the two grounds was the basis for its decision.

Based on the way California Rules of Court, rule 3.1354(c) formats rulings on objections to evidence and the absence of any legislative history in the record showing a contrary intent, we conclude that trial courts have fulfilled their responsibility under section 437c, subdivision (g) to state the reasons for excluding evidence when they provide an explicit statement as to whether a particular evidentiary objection was sustained or overruled.

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13 A narrow interpretation of the phrase "any other determination" would limit it to determinations of issues raised in the motion for summary judgment itself. Under this narrower interpretation, rulings on matters outside the motion, such as evidentiary objections and requests for judicial notice, would not qualify as a "determination" covered by the last two sentences of section 437c, subdivision (g).

Therefore, we reject Olson's argument that the trial court committed prejudicial error when it failed to state, in writing or orally, the specific legal ground or grounds it relied upon in sustaining N+G's evidentiary objections. The trial court's written order stated which objections were sustained and which were overruled and that statement fulfilled any obligation imposed on the trial court by section 437c, subdivision (g) or California Rules of Court, rule 3.1354(c).

C. Triable Issue of Fact Regarding County's Damages

1. N+G's Prima Facie Showing Regarding Absence of Damages

Under the second step of the three-step analysis employed to decide a motion for summary judgment, the moving party has the initial burden of showing that a judgment in its favor is justified. (*Brantley*, *supra*, 42 Cal.App.4th at p. 1602.) To satisfy this burden, the moving party must "make a prima facie showing of the nonexistence of any triable issue of material fact …." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The inquiry into whether the moving party made a prima facie showing involves an examination of the facts and supporting evidence listed in the moving party's separate statement.[14]

In this case, N+G's separate statement set forth a number of ultimate facts regarding County's alleged damages, including the assertion that "County did not incur any damages arising from any alleged breach of N&G contract with the County." As

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14 The requirements for a separate statement are established by statute and rule. Section 437c, subdivision (b)(1) provides that the moving party's "supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed." California Rules of Court, rule 3.1350(d) provides that the "…Separate Statement of Undisputed Material Facts in support of a motion must separately identify … each supporting material fact claimed to be without dispute with respect to the cause of action …. In a two-column format, the statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column…."

evidentiary support, N+G referenced Olson's response to N+G's special interrogatory No. 56. That special interrogatory asked whether Olson contended that County incurred any damages arising from N+G's alleged breach of the Agreement with County. Olson responded "No" and, as a result, did not respond to subsequent interrogatories asking about the facts, identity of witnesses, and identity of documents supporting such a contention. From the record presented and the trial court's comments at the hearing on the motion, it does not appear that Olson amended this or any other discovery response concerning damages.

California courts have recognized that a party's interrogatory responses are not necessarily binding for purposes of summary judgment. (*Mason v. Marriage & Family Center* (1991) 228 Cal.App.3d 537, 546.) They may be contradicted or explained away by other evidence. (*Ibid*.; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) ¶ 8:1245, p. 8D-62.) Based on these principles, we conclude that (1) a party moving for summary judgment may use the opposing party's responses to interrogatories to make a prima facie showing of the nonexistence of a triable issue of material fact and (2) the opposing party is not barred from presenting other evidence that contradicts the interrogatory response or from explaining why the answer is incorrect. (See *Mason v. Marriage & Family Center*, *supra*, at p. 546 [detailed explanation in plaintiff's declaration as to the date her injury began contradicted date given in interrogatory response; explanation created a question of fact and, therefore, summary judgment was reversed].)

In this case, we conclude that N+G carried its initial burden on the factual question whether County suffered any damages as a result of N+G's breach of contract or professional negligence in preparing the plans and specifications. Therefore, we proceed to the third step of the summary judgment analysis and examine the evidence presented by Olson.

2. Olson's Evidence Regarding County's Damages

a. Legal Principles

The third step of the summary judgment analysis concerns whether a plaintiff demonstrated the existence of a triable issue of material fact. (See *Brantley*, *supra*, 42 Cal.App.4th at p. 1602.) Stated in more detail, once a moving party defendant has met its burden and made the requisite prima facie showing, "the burden shifts to the plaintiff … to show that a triable issue of one or more material facts exists as to that cause of action …." (§ 437c, subd. (p)(2).)

Deciding whether a plaintiff has carried its burden begins with an examination of the contents of the plaintiff's separate statement. Pursuant to California Rules of Court, rule 3.1350(f), the separate statement of a party opposing a motion for summary judgment must unequivocally state whether the facts set forth in the moving party's separate statement are "disputed" or "undisputed." Furthermore, the "opposing party who contends that a fact is disputed must state … the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and the line numbers in the evidence submitted." (Cal. Rules of Court, rule 3.1350(f).)

b. Olson's Theory of Error Regarding Cushman Declaration

Olson argues that the trial court erred in sustaining objections to portions of Cushman's declaration because those portions created triable issues of material fact relating to damages and problems with the plans and specifications. Olson asserts that "Cushman's declaration sets forth facts to support both the duty of care owed to the owner by [N+G] and the damages incurred by the owner as a result [of] deficient plans and specifications."

c. Analysis of Cushman's Declaration

Our inquiry concerning the Cushman declaration lead us to review Olson's separate statement (and related notice of errata filed May 11, 2011) and identify where

Olson relied on the declaration as evidence to support Olson's position that a fact asserted by N+G was disputed. (See Cal. Rules of Court, rule 3.1350(f) [separate statement must describe evidence that creates a dispute of fact].)

References to the Cushman declaration were included in Olson's separate statement as a result of the notice of errata. Consequently, we will examine whether the contents of that declaration constitute evidence that County suffered damages as the result of N+G's alleged breach of the Agreement or its alleged negligence in preparing the plans and specifications.

Olson's opening brief plainly sets forth its position that "Cushman's declaration sets forth facts to support … the damages incurred by the owner as a result [of] deficient plans and specifications." Olson, however, did not provide a citation to the portions of Cushman's declaration that it believed addressed County's damages. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [any reference to a matter in the record must be supported with a citation to the record where the matter appears].) Despite the absence of a citation, we reviewed Cushman's four-page declaration for information relevant to County's damages. We found that Cushman did not address how County might have been damaged by the allegedly deficient plans and specifications. Cushman, however, did state that the plans failed to provide information required by AISC standards "and caused numerous delays and additional cost *to Olson & Co* to secure correct information and/or missing information in order to detail and then fabricate the structural steel for the Gallo [Center]." (Italics added.) This statement about harm to Olson is not evidence that County also suffered losses.

Because the Cushman declaration does not include information about damage or harm to County, it cannot be used to create a disputed fact regarding the existence of those damages. In other words, Olson cannot rely on the Cushman declaration to carry its burden of showing that a triable issue of material fact exists as to the damage element of the causes of action that County assigned to Olson. (§ 437c, subd. (p)(2).)

Lastly, if we further assume that the Cushman declaration implied he held the opinion that County suffered damages and should be interpreted as such, the trial court properly sustained objections to portions of the declaration on the ground that the declaration lacked foundation for such an opinion because it did not set forth the facts relied upon as the basis for the opinion.[15] (See Evid. Code, § 801 [admissibility of expert opinion].)

In summary, Olson has not established that the Cushman declaration showed the existence of a triable issue of material fact regarding County's damages. As a result, Olson has not established the trial court's evidentiary rulings excluding portions of that declaration constituted reversible error.

d. Olson's Other Evidence Regarding Damages

Olson contends that other evidence supports a possible finding that County sustained damages in the form of cost overruns and time delays that resulted from the defective plans and specifications. This theory of damages is based on the $500,000 paid to C&S by County to settle the Consolidated Action.

Olson's opening brief references two types of evidence related to this payment. The first is the declaration of its attorney who was part of the settlement negotiations. That declaration asserted: "The $500,000 was specifically represented to me to be compensation to be paid to the construction team including Olson & Co. The County's attorney further described the new money as damages suffered by the County from the claims of Clark & Sullivan Builders and Olson & Co Steel on the Gallo [Center]."

This assertion by Olson's attorney was the subject of N+G's objection No. 2, which the trial court sustained. One of the grounds for the objection was that the evidence was inadmissible hearsay. The objection on hearsay grounds, according to

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[15] This evidentiary ruling by the trial court withstands scrutiny under either the independent or the abuse of discretion standard of review.

Olson's opening brief, was improper because the hearsay objection was made in a compound sentence that also asserted the challenged statement was improper opinion testimony. Olson cites no authority for the proposition that a *compound objection* is improper and must be overruled. (Cf. *Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 124 [compound questions are objectionable].) We conclude that the discretion granted to trial courts when ruling on evidentiary objections allows the court to consider each ground in a compound objection. Furthermore, in this case, we conclude that the trial court properly excluded the challenged statement on hearsay grounds. Both sentences of the challenged statement described matters told to the declarant by someone else and were offered for the truth of the matter asserted. (Evid. Code, § 1200.) Because the hearsay ground justifies the trial court's decision to sustain the objection, we do not address additional grounds, such as the mediation privilege, for excluding the statements.

The second type of evidence referred in Olson's opening brief are the documents filed by County in connection with its attempt to have the superior court issue a good faith determination regarding the settlement of the Consolidated Action. Those documents include (1) the motion for determination of good faith settlement; (2) the memorandum of points and authorities in support of the motion; (3) the supporting declaration of an attorney representing County; and (4) a copy of the settlement agreement and mutual release between C&S, County, Olson and Collins Electrical Company, Inc. The memorandum of points and authorities stated that "County and C&S, Collins, and Olson reached a separate settlement consisting of a cash payment by the County of $500,000, the release by the County of $2.2 million paid to [C&S] during the Project and held in an escrow account as the Project retention, and the release by the County of the C&S contract balance of $491,052." The memorandum of points and authorities also stated that "because Olson made claims about the Project design, the County assigned to Olson the County's rights against the design team, effectively taking the County out of 'the middle' of a dispute between Olson and the design team."

The settlement agreement itself contains recitals stating that (1) Olson was among the subcontractors that submitted claims for additional compensation to C&S and (2) Olson's "claim was and is based on OLSON's assertion that the Project plans and specifications were deficient and contained numerous material errors and omissions." Under the settlement agreement, Olson released its claims against County and obtained an assignment of County's rights to pursue damages against N+G. The settlement agreement does not apportion the $500,000 payment to specific injuries or identify the reason for the payment. For example, the settlement agreement does not explicitly state that the $500,000 is intended to resolve claims against County that C&S and the subcontractors made based on the allegation that the plans and specifications prepared by N+G were deficient.

We conclude that the settlement agreement and the documents related to the motion for determination of good faith do not connect the $500,000 payment County made to C&S to alleged defects in the plans and specification. The settlement agreement and the other documents are too general to support the existence of such a connection.

Therefore, we conclude that Olson failed to present evidence creating a triable issue of material fact regarding whether County was damaged as a result of the allegedly defective plans and specifications prepared by N+G. In short, Olson did not present evidence sufficient to contradict its discovery responses regarding County's damages. Accordingly, the trial court properly granted the motion for summary judgment as to Olson's first three causes of action and that order will not be affected by our reversal of the judgment.

DISPOSITION

The judgment is reversed. The trial court is directed to (1) vacate its December 22, 2010, order granting N+G's motion for judgment on the pleadings and denying leave to amend and (2) enter a new order granting the motion for judgment on the pleadings with leave to amend the negligence claims. The trial court's order should direct Olson to

file an amended pleading that addresses, in a manner not inconsistent with this opinion, (1) the factors relevant to imposing a duty of care as to its claims for negligent design, (2) the factors relevant to imposing a duty of care as to its claims for negligent supervision, and (3) the issue regarding the accrual of any negligence claims on or after August 11, 2007.

Olson shall recover its costs on appeal.

_____
Franson, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

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Levy, J.